

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:LM:NR:DAL:1:TL-N-1328-01  
SRJensen

date: MAY 07 2001

to: [REDACTED], Team Coordinator, [REDACTED]

from: Associate Area Counsel, LMSB, Natural Resources

subject: Validity of Forms 870-P for various TEFRA Entities

TIN: [REDACTED]

TIN: [REDACTED]

TIN: [REDACTED]

TIN: [REDACTED]

TIN: [REDACTED]

This memorandum responds to your oral request for assistance on approximately March 12, 2001. This memorandum should not be cited as precedent.

Recently, you requested our opinion regarding the correctness of Forms 870-P "Agreement to Assessment and Collection of Deficiency in Tax for Partnership Adjustments" obtained from partners which are also subsidiary members of the [REDACTED] (hereinafter "[REDACTED]") consolidated group for taxable periods involving [REDACTED] and/or [REDACTED] related to the above-listed TEFRA entities. Attached hereto are the diagrams showing the structure of [REDACTED] from [REDACTED] received from you.

**Issue**

Whether the proposed Forms 870-P agreements for partners of the above-referenced TEFRA entities, which partners are also subsidiary members of a consolidated group, are correct as drafted and executed by the respective partner, and if not,

- (1) who should be identified as the taxpayer on the Forms 870-P,
- (2) who should sign the Forms 870-P on behalf of the subsidiary member, and
- (3) how should the signature block appear on the Form 870-P.

Conclusion

No. Based on the information you provided, neither the Forms 870-P signed by the subsidiary partner or the Forms 870-P currently proposed for signature comply with the preferred signature method when the partner subsidiary is part of a consolidated filing group. Under the preferred method, someone with authority to sign for the parent and someone with authority to sign for the partner subsidiary should sign the same Form 870-P.

As a result, we recommend that new Forms 870-P be obtained for each of the partners of the following TEFRA partnerships:

a. [REDACTED]

Partner: [REDACTED], Tax Matters Partner: We recommend that you obtain a new Form 870-P for partner "[REDACTED]" signed by both the subsidiary partner [REDACTED] and the parent corporation [REDACTED]. Accordingly, the signature blocks would appear as follows:

[REDACTED], Parent, by John Smith, President  
on behalf of [REDACTED], Subsidiary, and  
Tax Matters Partner of [REDACTED] Joint Venture.

[REDACTED] by John Doe, President  
Tax Matters Partner of [REDACTED] Joint Venture

Partner: [REDACTED]: We are making no conclusion or recommendation regarding the Form 870-P for [REDACTED] as we lack information sufficient to make the appropriate determination. However, if [REDACTED] is a part of a consolidated filing group or a pass-thru entity the Form 870-P should be signed as discussed below in section two of the Analysis.

b. [REDACTED]:

Partner: [REDACTED], Tax Matters Partner: We recommend that you obtain a new Form 870-P for partner "[REDACTED]" signed by both the subsidiary partner, [REDACTED], and by the parent, [REDACTED]. Accordingly, the signature blocks would appear as follows:

[REDACTED], Parent, by John Smith, President  
on behalf of [REDACTED], Subsidiary and  
Tax Matters Partner of [REDACTED] Development Partnership

[REDACTED] by John Doe, President  
Tax Matters Partner of [REDACTED] Development Partnership

**Partner:** [REDACTED]: We are making no conclusion or recommendation regarding the Form 870-P for [REDACTED] as we lack information sufficient to make the appropriate determination. However, if [REDACTED] is a part of a consolidated filing group or a pass-thru entity the Form 870-P should be signed as discussed below in section two of the Analysis.

c. [REDACTED]

**Partner:** [REDACTED], **Tax Matters Partner:** We recommend that you obtain a new Form 870-P for partner "[REDACTED]" signed by both the subsidiary partner, [REDACTED], and by the parent, [REDACTED]. Accordingly, the signature blocks would appear as follows:

[REDACTED], Parent, by John Smith, President  
on behalf of [REDACTED], Subsidiary and  
Tax Matters Partner of [REDACTED]

[REDACTED] by John Doe, President  
Tax Matters Partner of [REDACTED]

**Partner:** [REDACTED]: We are making no conclusion or recommendation regarding the Form 870-P for [REDACTED] as we lack information sufficient to make the appropriate determination. However, if [REDACTED] is a part of a consolidated filing group or a pass-thru entity the Form 870-P should be signed as discussed below in section two of the Analysis.

d. [REDACTED]

Tax year ended 12/31/ [REDACTED]

**Partner:** [REDACTED]: We recommend that you obtain a new Form 870-P for partner "[REDACTED]" signed by both the subsidiary partner, [REDACTED], and by the parent, [REDACTED]. Accordingly, the signature blocks would appear as follows:

[REDACTED], Parent, by John Smith, President  
on behalf of [REDACTED], Subsidiary

[REDACTED] by John Doe, President

**Partner:** [REDACTED] **Tax Matters Partner:** We recommend that you obtain a new Form 870-P from the partner "[REDACTED]" with a signature block which appears as follows:

[REDACTED] by John Doe, President  
Tax Matters Partner of [REDACTED]

From the information provided, we cannot ascertain whether [REDACTED] is part of a consolidated filing group, and if so, the parent of the group. If it is a member of a consolidated filing group then on the same consent, we also recommend the parent's signature as discussed below in section two of the Analysis.

**Partner:** [REDACTED]: While we have only limited information regarding this partner, it appears that his Form 870-P is properly executed assuming that he is signing only on his own behalf.

**Partner:** [REDACTED]: While we have only limited information regarding this partner, it appears that his Form 870-P is properly executed assuming that he is signing only on his own behalf.

Tax year ended 6/30/[REDACTED]

The same recommendations and discussions set forth immediately above for each respective partner for tax year ended 12/31/[REDACTED] also apply for tax year ended 6/30/[REDACTED]. In addition, we also make the following recommendations:

**Partner:** [REDACTED]: We recommend that you obtain a new Form 870-P for partner "[REDACTED]" signed by both the subsidiary partner, [REDACTED], and by the parent, [REDACTED]. Accordingly, the signature block would appear as follows:

[REDACTED], Parent, by John Smith, President  
on behalf of [REDACTED], Subsidiary

[REDACTED] by John Doe, President

**Partner:** [REDACTED]: We are making no conclusion or recommendation regarding the Form 870-P for this partner as we lack information sufficient to make the appropriate determination. However, if this partner is a part of a consolidated filing group or a pass-thru entity the Form 870-P should be signed as discussed below in section two of the Analysis.

e. [REDACTED]

**Partner:** [REDACTED], **Tax Matters Partner:** We recommend that you obtain a new Form 870-P for partner "[REDACTED]", signed by both the subsidiary partner, [REDACTED], and by the parent, [REDACTED]. Accordingly, the signature blocks would appear as follows:

[REDACTED], Parent, by John Smith, President  
on behalf of [REDACTED], Subsidiary and  
Tax Matters Partner of [REDACTED]

[REDACTED] by John Doe, President  
Tax Matters Partner of [REDACTED]

**Partner:** [REDACTED]: We are making no definitive conclusion or recommendation regarding the Form 870-P for this partner as we lack information sufficient to make the appropriate determination. Based on the information that was provided to us, this appears to be a pass-thru partner. The determination of who should sign the Form 870-P for the pass-thru partner depends on whether or not it is an entity, in this case a partnership, subject to the unified audit rules. If this pass-thru partner is a partnership subject to the unified audit rules, the TMP should sign the Form 870-P. If this pass-thru partner is not a partnership subject to the unified audit rules, then the general partner should sign the Form 870-P. In addition to binding the TMP partner or general partner who signs to Form 870-P to the settlement, this will also bind any "unidentified" indirect partners of the pass-thru partnership.

However, if any indirect partners of the pass-thru partner have been properly "identified", then we also recommend that you obtain Forms 870-P from those indirect partners. An indirect partner is properly "identified" when the IRS has been notified of the indirect partner's name, address and beneficial interest in the partnership, in accordance with section 6223(c)(1) and Temp. Treas. Reg. § 301.6223(c)-1T, at least 30 days before the settlement agreement is entered into with the pass-thru partner. I.R.C. § 6224(c)(1). Based on a lack of information, we cannot make this determination. However, you should determine whether this situation might apply to any indirect partners involved in this case and if so, obtain the necessary Forms 870-P from those indirect partners.

## Analysis

### ***I. Settlement Agreements, General Information***

Unified audits can be closed through a settlement agreement with the IRS. For partnership tax years ending before August 6, 1997, the Service should use Form 870-P (or Form 870-P(AD)) for cases involving settlement of partnership items. When the settlement includes partner-level determinations pursuant to I.R.C. §§ 704(d), 465, or 469, as well as additions to tax and interest under I.R.C. § 6621(c), the Service should use Form 870-L (or Form 870-L(AD)).<sup>1</sup> Based on the information provided, each of the partnerships identified for analysis involve tax years which end before August 6, 1997.

#### ***A. Who may enter into settlement agreements***

Section 6224(c)(1) provides that the Secretary may enter into a binding settlement agreement as to a partnership item with any partner, and that the settlement agreement binds with finality those partners who execute the agreement. In some circumstances, the TMP and a pass-thru partner can also bind other partners.

**Partner:** For purposes of the unified partnership audit rules a "partner" is a partner in a partnership, and any other person whose income tax liability is determined in whole or in part by taking into account directly or indirectly partnership items of the partnership. I.R.C. § 6231(a)(2). A "partnership" is any partnership required to file a partnership return, except for certain small partnerships. I.R.C. § 6231(a)(1). The general rule under Code section 6031(a) requires every partnership (as defined in section 761(a)) to make a return for each taxable year. A "partnership" for these purposes includes a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, and which is not, a corporation or a trust or estate. See I.R.C. § 761(a).

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<sup>1</sup>Changes enacted in the Taxpayer Relief Act of 1997 require partnership agreements (settlements) to be made on different forms, depending on the partnership tax year. For tax years ending after August 5, 1997, the Service should use Form 870-PT (or Form 870-PT(AD)) for cases involving agreements for partnership items and partnership-level determinations as to penalties, additions to tax and additional amounts, and a waiver of restrictions on assessment of partnership items, penalties, additions to tax and additional amounts. The Service should use Form 870-LT (or Form 870-LT(AD)) when the agreement (or settlement) includes any other affected item.

**TMP:** Nonnotice partners who have not formed a 5-percent notice group will be bound by a settlement agreement entered into by the TMP which is expressly stated to cover such partners, unless they have previously filed a statement with the Service denying the TMP the right to enter into a settlement agreement on their behalf. I.R.C. § 6224(c)(3); Temp. Treas. Reg. § 301.6224(c)-1T.

**Pass-thru Partner:** An indirect partner may be potentially bound by a settlement agreement entered into by his pass-thru partner. An "indirect partner" is a person holding an interest in a partnership through one or more pass-thru partners. I.R.C. § 6231(a)(10). The term "pass-thru" partner means a partnership, estate, trust, S corporation, nominee, or other similar person through whom other persons hold an interest in the partnership. I.R.C. § 6231(a)(9).

If a pass-thru partner enters into a settlement agreement with the IRS, he binds all indirect partners having an interest in the partnership, unless the IRS has been notified of the indirect partner's name, address and beneficial interest in the partnership, in accordance with section 6223(c)(1) and Temp. Treas. Reg. § 301.6223(c)-1T, at least 30 days before the settlement agreement is entered into with the pass-thru partner. I.R.C. § 6224(c)(1).

For example: C, a Subchapter S corporation and D, a limited partnership, are partners in Partnership CD. On audit of CD for 1983, the Service offers a settlement in which C and D both join. C agrees by its president, D by its managing (and only) general partner. The other partners in D have previously been identified to the Service but the shareholders of C have not. The settlement is binding on each shareholder of C. However, it is not binding on the limited partners in D. Thus, any limited partner in D can contest adjustments to the CD return for 1983.

The following persons are authorized to enter into a settlement agreement on behalf of a pass-thru partner that binds unidentified indirect partners:

- Where the pass-thru partner is a partnership subject to the unified audit rules, the TMP;
- Where the pass-thru partner is a partnership not subject to the unified audit rules, such as a small partnership, any general partner;
- Where the pass-thru partner is an S corporation subject to the unified audit rules, the TMP;

- Where the pass-thru partner is an S corporation not subject to the unified audit rules, such as a small S corporation, any officer. Temp. Treas. Reg. § 301.6224(c)-2T(b).

***B. Who can enter into a settlement when the partner is a subsidiary member of a consolidated filing group.***

There is potential for disagreement regarding a subsidiary partner's authority to enter into settlement agreements when it is a member of a consolidated group. On the one hand, section 6224 provides that a partner can bind itself to the settlement of partnership items. On the other hand, the consolidated return regulations provide that the common parent is the agent of its subsidiaries for all purposes. Treas. Reg. § 1.1502-77(a).

This tension could be settled by looking to Treas. Reg. § 1.1502-80, which provides that where a consolidated return regulation is inconsistent with a Code section that specifically applies, the Code section controls. Nonetheless, allowing a subsidiary to bind all members of its consolidated group is inconsistent with the fundamental consolidated group principal of the common parent as agent. To resolve this potential inconsistency between the provisions and to best protect the Service's interest, we believe that both the common parent and the subsidiary partner should sign a single Form 870-P. The common parent signs in its capacity as agent for the subsidiary partner.

***II. Analysis Specific to Request***

***A. Who should be identified as the taxpayer on the Forms 870-P.***

The appropriate party to list in the taxpayer block on the Forms 870-P is the "partner" of the TEFRA partnership. This could include an individual, corporation, partnership, or other types of entities. Some confusion may arise when the partner is a member of a consolidated group or pass-thru entity. If the partner is a subsidiary member of a consolidated filing group, the appropriate party to list in the taxpayer block is the subsidiary "partner" company; not the parent. If the partner to the TEFRA partnership is a "pass-thru" partner, then that pass-thru partner is the appropriate party to list in the taxpayer block.

However, it should be noted that when dealing with pass-thru partners, it may be necessary to obtain Forms 870-P from some of



the indirect partners of the pass-thru partner. This is necessary when the Service has been notified of the indirect partner's name, address and beneficial interest in the partnership, in accordance with section 6223(c)(3) and Temp. Treas. Reg. § 301.6223(c)-1T, at least 30 days before the settlement agreement is entered into with the pass-thru partner. See I.R.C. § 6224(c)(1). In this situation, the indirect partner is the appropriate party to list in the taxpayer block.

***B. Who should sign the Forms 870-P on behalf of the partner, and how should the signature block appear on the Form 870-P.***

When obtaining signatures from any entity, the signatures should be obtained from someone with authority to bind the entity. In the case of a corporation, usually, authority is vested in the president. In the case of a partnership, authority is usually vested in the TMP or general partner. Note that we are offering no opinion regarding any person's specific authority to sign the Forms 870-P submitted for our review due to a lack of information. In any event, you should make sure that the person or persons signing the Forms 870-P have the authority to act for the corporation or partnership. This can be determined from a review of the specific corporation's bylaws, the partnership agreement, or other similar documents. In any event, at a minimum you should make sure that the person acting for the corporation or partnership represents that they have the authority to bind the corporation or partnership. It is always preferable to obtain this representation in writing.

**Partner who is an individual.**

When the partner is an individual, that person should sign the Form 870-P. Accordingly, the signature block would appear as follows:

**[Name of individual]**

For example:

John Smith

**Partner who is a corporation; not in a consolidated filing group.**

When the partner is a corporation that is not a member of a consolidated filing group, someone with authority to sign on behalf of that corporation should sign the Form 870-P. Accordingly, the signature block would appear as follows:

[Name of corporation]  
by [name of authorized representative, and title]  
(and if applicable) Tax Matters Partner of [name of TEFRA  
partnership].

For example:

XYZ Corporation, by John Smith, President  
Tax Matters Partner of X Partnership

Partner who is a subsidiary corporation of a consolidated  
filing group.

When the partner of the TEFRA partnership is a subsidiary corporation of a consolidated filing group, both the parent corporation and the subsidiary corporation should sign the same Form 870-P for the subsidiary corporate partner. Accordingly, the signature blocks should appear as follows:

[Name of parent corporation], Parent,  
by [name of authorized representative, and title]  
on behalf of [name of subsidiary corporation], Subsidiary,  
(and if applicable) Tax Matters Partner of [name of TEFRA  
partnership].

[Name of subsidiary corporation]  
by [name of authorized representative, and title],  
(and if applicable) Tax Matters Partner of [name of TEFRA  
partnership].

For example:

ABC Corporation, Parent, by Jane Doe, President  
on behalf of XYZ Corporation, Subsidiary, and  
Tax Matters Partner of X Partnership.

XYZ Corporation, by John Smith, President  
Tax Matters Partner of X Partnership.

Partner who is a pass-thru entity.

When the partner of the TEFRA partnership is a pass-thru entity, the Form 870-P should be signed by someone with authority to bind that particular pass-thru entity. Typically this would be a TMP, General Partner, or S corporation officer depending on the type of pass-thru entity. Accordingly, in situations where the pass-thru entity has a TMP or General partner, the signature block should appear as follows:

[Name of TMP or general partner]  
by [name of authorized representative, and title]  
Tax Matters Partner or General Partner (whichever is appropriate)

For example:

MMM, Inc., by Peter Smith, President  
Tax Matters Partner

Note that if the particular TMP or General Partner of the pass-thru entity is also a subsidiary corporation of a consolidated filing group, then its parent should also sign the Form 870-P. Accordingly, on the same Form 870-P, the parent corporation should sign as follows:

[Name of parent corporation], Parent  
by [name of authorized representative, and title]  
on behalf of [name of subsidiary TMP or general partner].

For example:

ABC Corporation, Parent, by Jane Doe, President  
on behalf of MMM, Inc., Subsidiary and Tax Matters Partner

Recall that the TMP, general partner, and S corporation officer of a pass-thru entity only bind themselves and the unidentified indirect partners of the partnership. Accordingly, where the IRS has been notified of the indirect partner's name, address and beneficial interest in the partnership, in accordance with section 6223(c)(1) and Temp. Treas. Reg. § 301.6223(c)-1T, at least 30 days before the settlement agreement is entered into with the pass-thru partner, then a separate Form 870-P for that indirect partner should be obtained. I.R.C. § 6224(c)(1). The Form 870-P for that indirect partner should be signed as discussed above in section two of the Analysis depending on whether the indirect partner is an individual, corporation, subsidiary corporation which is a member of a consolidated group or pass-thru partner.

This document is subject to the Large Case Coordination Procedures of CCDM 35(19)4(4). Pursuant to this provision, a copy of this advice has been forwarded to the Associate Chief Counsel for his review concurrent with the providing of this advice to you. Within ten days of receipt, the appropriate Associate Chief Counsel is required to respond regarding the advice. The response will indicate whether the National Office: (a) concurs with the field advice; (b) believes some modification of the advice is appropriate; or (c) needs additional information or time for analysis in order to evaluate the advice. Our office will inform you of the comments received by us.

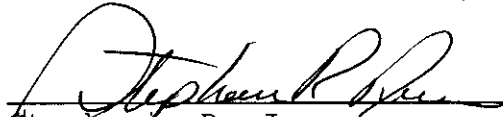
If you have any questions concerning this memorandum or need additional information, please call attorney Stephanie Jensen at 972-308-7900.

*Disclosure Statement*

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

John S. Repsis  
Associate Area Counsel (LMSB)

By:

  
Stephanie R. Jensen  
Attorney (LMSB)

Attachments:


Diagram of 

Diagram of 